FILE COPY

No. 477

CHARLES EL

IN THE

Supreme Court of the United States

BARKER PAINTING COMPANY,

Petitioner,

vs.

LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN AND HARRY S. WARREN,

Respondents.

Petition for Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

BARKER PAINTING COMPANY, *Petitioner,* *vs.* LOCAL NO. 734, BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA; GEORGE W. HOFFMAN and HARRY S. WARREN, *Respondents.*	*Petition for Writ of Certiorari Directed to the United States Circuit Court of Appeals for the Third Circuit.*

(Italics mine except where otherwise noted.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, BARKER PAINTING COMPANY, a corporation organized and existing under the laws of the State of New Jersey, humbly showeth:

1. A bill in equity was filed in the United States District Court, for the District of New Jersey, by petitioner, Barker Painting Company, which has its home office in the City of New York, and is engaged in the business of painting and decorating over the United States and Canada, including the States of New York, New Jersey, Pennsylvania and the District of Columbia, to enjoin the respondent, the Brotherhood of Painters, Decorators and Paperhangers of America, a National labor organization, operating throughout the entire United States, and the respondent Local No. 734, which claims jurisdiction over all persons engaged in painting or decorating within the territory of Somerville, Somerset

County, New Jersey, and the respondent, Harry S. Warren, who is the organizer for the State of New Jersey of the National union, and the respondent, George W. Hoffman, who is the business agent of Local No. 734, to enjoin the enforcement, by strike and interference with the employees of petitioner, of a rule of the National union which requires an employer, performing work other than in his home city, to pay the wage scale, either of his home city or of the place where the work is being performed, *whichever be the higher* (Bill of Complaint, p. 3). The bill alleged, and the proof on final hearing showed that: Petitioner employed exclusively union labor, operating closed union shop; petitioner on November 8, 1924, took a contract from the general contractor for the painting work on a hospital in Somerville, Somerset County, New Jersey; the contract provided that the work should be performed as required by the progress of the job; petitioner proceeded, employing help all local to Somerville except the foreman; it complied with all union conditions as to hours and wages, etc., for the territory including Somerville; the work proceeded from December 7, 1924, to February 21, 1925, with all of the men satisfied; on February 21, 1925, George W. Hoffman, the business agent of Local No. 734, instructed by Harry S. Warren the state organizer of the National union, insisted that petitioner pay the wage scale of New York, its home town, which was higher than that for Somerville, and threatened that, if it did not, the employees of petitioner would be directed not to work; petitioner refused; the men were directed to cease work and did so although satisfied with their wages, hours and working conditions; they ceased only because they feared, if they continued at work, that they would be expelled from the union and thereby deprived of earning a livelihood, the industry being, in effect, 100 per cent. unionized; the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was and is so unionized, and all other

branches of the building industry in the territory were and are so unionized, and the agreements between the different branches of the industry were and are such, as that no painting work could or can be performed except with union labor, for if it were so performed, all other branches of the industry would withdraw from the building and it could never be completed; a contractor cannot be "fair" in one place and "unfair" in another and if he employs non-union labor on one job all of his jobs, whether manned exclusively with union labor or not will be struck throughout the country, and all building trades would withdraw from any job upon which he was employed anywhere in the country; the National union threatened to compel petitioner and all other painting contractors to comply with the rule by strikes, boycotts, etc.; the effect of the rule and its enforcement already had been such as that painting contractors of New York could not take work in New Jersey; the business is highly competitive and the effect of the rule, if enforced, would be to limit all painting work to local contractors.

2. The bill was filed March 16, 1925 (p. 3) to enjoin the enforcement of the rule, and the actual interference with the performance of the contract of petitioner for the painting work on the hospital in Somerville was alleged as an overt act and an injunction prayed against that interference. Upon the filing of the bill *ad interim* restraint went and, before final hearing, the building had been completed.

3. The case came on for final hearing, and, on April 14, 1926, an opinion was filed by Runyon, District Judge (p. 20), which resulted in the final decree dismissing the bill (p. 33).

4. From that decree an appeal was taken to the Circuit Court of Appeals for the Third Circuit, which resulted in the opinion of the court August 12, 1929, and the order of affirmance (Addendum to the State of Case).

5. The jurisdiction of the District Court was based both upon diversity of citizenship and constitutional grounds.

6. The Circuit Court of Appeals declined to consider the merits for two reasons: (1) Because of its prior decision on a review from the denial of a preliminary injunction by the District Court for the Eastern District of Pennsylvania (Judge Buffington dissenting) in *Barker Painting Company* v. *The Brotherhood,* 15 Federal (2nd) 16, and (2) Because the particular work of petitioner, which had been interfered with by the union, had been completed pending the proceedings under the protection of the temporary restraint.

7. Petitioner has therefore been deprived of a review upon the merits by the Circuit Court of Appeals.

8. The writ of certiorari is applied for because the Circuit Court of Appeals, in declining to review the decree dismissing the bill upon its merits, decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this court, and because the decree of the District Court decided a matter of so much general importance and of so far-reaching effect as to call for the determination of this court and because the District Court gave effect to a statute of New Jersey which, as construed by the Court of Errors and Appeals of New Jersey in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. Eq. 632; 126 Atl. 399, overruling its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Assn.,* 77 N. J. Eq. 219; 79 Atl. 262 (written by Chancellor Pitney, afterward a justice of this court) and as construed by the District Court is offensive to the provisions of the 14th Amendment to the Constitution, upon the reasoning of the determination of

this court in *Truax* v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254.

9. The decision of the Circuit Court of Appeals for the Third Circuit, in *Barker Painting Company* v. *The Brotherhood*, 15 Federal (2nd) 16, was on a review of a decree refusing a *preliminary* injunction. Judge Woolley, writing the opinion for the majority of the Court (Judge Buffington dissenting), after referring to what might be urged by the union as justification for the rule, said:

> "We advert to these possibilities, certainly not to express our views, nor to intimate sympathy with the rules—for assuredly we have none—nor to suggest arguments in support or reasons justifying their promulgation, but merely to show that many variable and intangible factors inevitably enter into the situation, making the injunctive process of doubtful propriety and legality."

He further referred to the fact that, up to the time of the pronouncement of the decision, all the decisions of the State Courts were against ~~enjoining~~ the enforcement enjoining of the rule while all of the decisions of the Federal Courts were contra and he said (p. 17):

> "The learned trial court was inclined to the reasoning of the state decisions; and so are we, not because the respondents have shown that the rules are lawful, but, rather, because the complainant has failed to show that they are unlawful."

The effect of the refusal of the Circuit Court of Appeals to consider the instant case on its merits was to give to its prior decision the quality of *res adjudicata*, although that decision was on an application for a temporary injunction which never issues except where the injury is imminent and the right clear both upon the law and the facts.

10. The effect of its refusal to review because, pending the suit, the particular work was completed was to treat the overt act, *i. e.*, the interference with the particular

contract, as that which was sought to be enjoined and to ignore the rule that equity acts to prevent a reasonably anticipated injury and actual injury is not required to set the court in motion.

The bill was aimed not only at the interference by the union with the performance of the particular contract but also at the anticipated acts of the union with respect to *all* of the work of petitioner throughout the country. The interference with the particular contract was relied on only as showing the reasonable probability that the union would so interfere generally.

11. The Circuit Court of Appeals in its decision in *Barker Painting Co.* v. *The Brotherhood,* 15 Fed. 2nd, p. 16 expressed no sympathy with the rule but stated that it was constrained to its holding as the result of a "cold consideration of the cited authorities." In the instant case it said:

> "While we should be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court, we are constrained, until then, to stand by the decision which we made not casually but after serious study and, we confess, much mental disturbance."

12. The effect of the decision of the District Court, which it is sought to review here, is to permit a labor organization operating over the entire country in a trade so closely unionized and so affiliated with other trades so closely unionized as that it is impossible for an employer to perform work without its consent, to arbitrarily discriminate between employers in the matter of wages demanded, the discrimination being based solely upon the residence of the employer, and to permit unions to combine, and such combinations, which may control labor throughout the United States, in an industry so unionized as that no work can be performed by an employer without employing union labor, to establish and enforce such discrimination. By such means employers of labor may

be driven out of a community, except those who may have their residence therein.

13. The difference in the wage scale is based solely upon the home town of the employer. He may employ at the place where the work is being performed all local help, yet, if the wage scale at his home town is higher than the wage scale at the place of performance of the work, he must pay the wage scale of his home town.

14. The District Court based its decision largely upon the statute of New Jersey, P. L. 1883, p. 36, 3 C. S. of N. J. 3051, sec. 128 reading as follows:

> "That it shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporations."

It relied upon the decision of the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399 (reversing the Court of Chancery of New Jersey, 95 N. J. E. 108; 122 Atl. 622, in granting an injunction in a case similar to that at bar) construing that statute and overruling its previous decision in *Jonas Glass Company* v. *Glass Bottle Blowers Association,* 77 N. J. E. 219; 79 Atl. 262, which was to the effect that, if the statute was to be construed as the Court of Errors and Appeals *did* construe it in *New Jersey Painting Company* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399, it was unconstitutional under New Jersey Constitution, article I, par. 1, which is the due process clause of the New Jersey Constitution, and, if offensive to that provision of the New Jersey Constitution, it would be equally offensive to the provision of the 14th Amendment to the Constitution of the United States which prohibits a state enforcing any law which denies due process of law

or the equal protection of the law. The District Court adopted the construction put upon the statute by the New Jersey Court of Errors and Appeals in *New Jersey Painting Company* v. *Local No. 26,* 96 N. J. E. 632; 126 Atl. 399, and gave effect to the statute as so construed with the result that the decree rests upon a statute which, as construed by the New Jersey Court of Errors and Appeals and by the District Court, is offensive to the provisions of the 14th Amendment to the Constitution of the United States.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Third Circuit, and of the District Court of the United States, for the District of New Jersey, and all proceedings in both courts, to the end that the said case may be reviewed and determined by this court, as provided by law, and that your petitioner may have such further and other relief or remedy in the premises as to this court may seem appropriate, and that the said decree of the United States Circuit Court of Appeals for the Third Circuit affirming the decree of the United States District Court for the District of New Jersey may be set aside and that the decree of the United States District Court, for the District of New Jersey, may be set aside and the record remitted to that court with instructions to enter a decree granting the relief prayed for by the plaintiff, and your petitioner will ever pray, etc.

MERRITT LANE,
Attorney for and of Counsel with Petitioner.

BRIEF IN SUPPORT OF APPLICATION FOR FOR CERTIORARI.

I.

The opinion of the court below.

The opinion of the United States District Court, for the District of New Jersey, the court of first instance, is reported in 12 Federal (2nd) 945, and is printed p. 20 of the record. The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 34 Federal (2nd) p. 3 (Advance sheets) and is printed in the addendum to the record.

II.

Jurisdiction.

The jurisdiction of this Court is rested on Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, sec. 1, 43 Statutes 938, sec. 347, title 28, U. S. C. A., p. 359.

The date of the decree of the United States Circuit Court of Appeals for the Third Circuit to be reviewed is August 12, 1929 (Addendum to record).

III.

The grounds on which the jurisdiction of this court is invoked.

In declining to review the decree of the United States District Court, for the District of New Jersey, upon its merits, the Circuit Court of Appeals for the Third Circuit has decided an important question of general law in a way probably untenable and in conflict with the weight of authority and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The United States District Court for the District of New Jersey and the Circuit Court of Appeals for the Third Circuit, by affirming its decree, have determined a matter of such general interest in a way which will lead to such incalculable harm and injury to rights of employers as that the matter should be reviewed by this court and have given effect to a statute of New Jersey, P. L. 1883, p. 36, C. S. of N. J. 3051, sec. 128, which, as construed by the District Court, is offensive to the 14th Amendment of the Constitution of the United States in that it denies due process of law and the equality of the law.

IV.

Statement of the case.

The case is fully stated in the petition, paragraph 1.

V.

Specification of errors.

1. The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in *Barker Painting Company* v. *The Brotherhood*, 15 Fed. (2nd) 16—

2. The Circuit Court of Appeals erred in declining to consider the merits because the particular work of petitioner which had been interfered with had been completed, under the protection of a temporary injunction.

3. The District Court erred in dismissing the bill and the Circuit Court of Appeals for the Third Circuit erred in affirming for the reasons that— (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by

combination is unlawful and a violation of the rights of petitioner; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, chapter 746, 26 Statutes at Large, p. 209, making illegal contracts, combinations and conspiracies in restraint of trade or commerce among the several states and its supplements and amendments, petitioner being engaged in interstate trade.

The case involves a matter of sufficient general importance to justify a review.

4. The decision of the United States District Court, for the District of New Jersey was based upon the statute of New Jersey heretofore referred to and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company case, and the effect is that the United States District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the 14th Amendment.

I.

The Circuit Court of Appeals erred in declining to consider the merits of the appeal because of its prior decision in Barker Painting Company vs. The Brotherhood, 15 Federal (2nd) 16.

The decision of the Circuit Court of Appeals in the case cited was on a review of a decree of a District Court of Pennsylvania declining to grant a preliminary injunction.

A consideration of the opinion will indicate that, in the last analysis, the Circuit Court of Appeals based its decision upon the rule that preliminary injunctions will not go unless the right is clear both upon the law and the fact. In its opinion it devoted considerable space to refer-

ence to reasons which *might* be advanced by the union in justification of the rule expressly stating that it did not do so to intimate any sympathy with the rule "for assuredly we have none."

That there is a distinction with respect to the amount and kind of proof which will induce a court to grant a permanent injunction after a full hearing and that which will induce a court to grant a preliminary injunction after a hearing only upon affidavits almost goes without saying.

The distinction is, I think, as well drawn as anywhere in *New Idea Pattern Co.* v. *Whitner*, 215 Pa. 193, 64 Atl. 518, at p. 520:

> "A preliminary injunction is not, however, to be granted where the plaintiff's right to it is in doubt. 1 Spelling, Extraordinary Relief, sec. 20; Black Lick Mfg. Co. *v.* Gas Co., 139 Pa. 448, 454, 21 Atl. 432; Waring *v.* Cram, 1 Pars. Eq. Cas. 516. The refusal of it does not repudiate the plaintiff's rights if he can ultimately establish any; it merely denies him an extraordinary remedy properly applicable only to cases in no respect equivocal; Daizell *v.* Crawford, 1 Pars. Eq. Cas. 37, 46."

An application was made in *Barker Painting Co.* v. *The Brotherhood,* 15 Fed. (2nd) 16, to this court for a certiorari, which was denied, 273 U. S. 748; 71 L. Ed. 872. It is impossible, of course, for counsel to know why it was denied, but it may well have been, the application being for a preliminary injunction, heard upon affidavits, that it was conceived that, if the matter was to be reviewed, it should be after a final hearing, with full opportunity to both sides to adduce all the proofs possible. The decree in the case at bar followed such a hearing.

II.

The Circuit Court of Appeals erred in declining to consider the merits because the particular work of petitioner, which had been interfered with, had been completed under the protection of a temporary injunction.

The Circuit Court of Appeals misapprehended the purpose of the bill. It was aimed at the conspiracy to interfere with *any* work of petitioner throughout the country on which petitioner did not pay the wage scale of his home town or of the place in which the work was being done, whichever was the higher. The International Union had adopted a resolution directing the enforcement of its rule which required such a wage scale to be paid and to enforce that rule its representatives threatened to interfere with *any* work upon which the rule was not being observed. The bill alleged, and the proofs showed, that the painting industry in New York, northern New Jersey, Connecticut and Pennsylvania was so unionized, and all other branches of the building industry in the territory were so unionized, and the agreements between the different branches of the industry were such, as that no painting work could be performed except by union labor for if it was so performed all other branches of the industry would withdraw from the building and it could never be completed and that a contractor could not be "fair" in one place and "unfair" in another, and if he employed non-union labor on one job all of his jobs, whether manned exclusively by union labor or not, would be struck throughout the country, and all trades would withdraw from any building job anywhere in the country upon which he was employed.

The National Union had notified all contractors by letter of December 5, 1921, Exhibit P. 4, p. 156, that the rule would be enforced. The bill alleged, and the proofs showed, that such an enforcement of the rule would re-

strict work to contractors local to the territory in which the work was being performed.

The actual interference by the union with the work of petitioner on the hospital in Somerville was alleged and proven only as indicating that the union meant what it said and as proof of the kind of interference which would be resorted to.

In *Bedford Cut Stone* v. *Journeymen S. C. Asso.*, 274 U. S. 37, at p. 54, and 71 L. Ed. 916, at p. 924, this court said:

> "The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears."

And this court quoted among other cases *Thompson Machine Co.* v. *Brown,* 89 N. J. E. 326-328; 104 Atl. 129, in which case the Court said:

> "If the threats, open and implied, of the various users of the machinery and workers thereon, are carried out, there will, unquestionably, be injury. This court does not wait until there is actual injury; it protects against anticipated injury."

In *Vicksburg Waterworks* v. *Vicksburg,* 185 U. S. 66, at p. 82, 46 L. Ed. 808, at p. 816, this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable."

III.

The District Court erred in dismissing the bill and the Circuit Court of Appeals for the Third Circuit erred in affirming for the reasons that (a) The conduct of defendants is a boycott, the result of a conspiracy, illegal at common law; (b) The rule is unreasonable and the classification bears no reasonable relation to the wage scale and the attempt of the unions to enforce the rule by combination is unlawful and a violation of the rights of petitioner; (c) The combination is in unfair restraint of trade, inimicable to public welfare and in violation of the public policy both of the State of New Jersey and of the United States and the combination and conspiracy is denounced by the Act of July 2, 1890, Chapter 746, 26 Statutes at Large, p. 209, making illegal contracts, combinations and conspiracies in restraint of trade of commerce among the several states, and its supplements and amendments, petitioner being engaged in interstate trade.

THE CASE INVOLVES A MATTER OF SUFFICIENT GENERAL IMPORTANCE TO JUSTIFY A REVIEW.

I will not attempt to argue the merits to any great extent. That there are merits to be argued is demonstrated by the facts that: up until the time of the decision of the Circuit Court of Appeals in the prior case, the *Barker Painting Company* v. *The Brotherhood,* 15 Fed. (2nd) 16, as stated by the court in that opinion, the State decisions were against the awarding of an injunction restraining the enforcement of the rule while the Federal decisions were contra; the Vice-Chancellor, in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, in a well-reasoned opinion, held that an injunction should go and it was necessary, in reversing, for the Court of Errors and Appeals of New Jersey, 96 N. J. E. 632; 126 Atl. 399, to overrule its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.,* 77 N. J. E. 219; 79 Atl. 262,

which had been taken as settled law, and to construe a statute of New Jersey in such a way as to make it offensive to the provisions of the 14th Amendment to the Constitution; the vote in the Court of Errors and Appeals was ten to five, with a short but vigorous and well-reasoned dissent by Judge White, p. 203; the Circuit Court of Appeals both in its prior decision in *Barker Painting Co.* v. *The Brotherhood*, 15 Fed. (2nd) 16, and in its decision in the present case, 34 Fed. (2nd) 3, addendum to the record, expressed its lack of sympathy with the rule, its "mental disturbance" and its more than gladness to have the case passed upon by the higher court, reaching its conclusion only because it felt that it was "constrained" to do so; Judge Buffington dissented in the first case and did not sit in the second.

The argument here will be confined to an attempt to indicate that the matter is of sufficient general importance to justify a review by this court.

The far-reaching effect of the adjudication that the union may enforce this rule by strikes, combinations and boycotts, cannot be over-estimated. If this union can promulgate such a rule and enforce it, *all* unions may do the same, and they may, in combination, enforce their respective rules with the result that labor may dictate what employers shall be permitted to perform work in certain localities. If a discrimination can be based upon the place of the employer's main office, it may be based upon whether the employer is an individual, corporation or partnership, and upon the amount of invested capital and upon the net worth and upon the return which the employer has been able to make upon his investment. I submit that no such power can be permitted to exist in any group or groups of men without the destruction of the fundamental principles upon which this government is founded—equality of opportunity.

The Circuit Court of Appeals for the Third Circuit in its opinion in *Barker Painting Co.* v. *The Brotherhood,* 15 Federal (2nd) 16 indicated its lack of sympathy with the rule and also pointed to the divergent holdings in the State and the Federal courts upon the validity of the rule. In its opinion in this case it confessed its "mental disturbance" in reaching the conclusion it had in the first case, and it stated that it would be more than satisfied to have this controversy between employer and organized labor finally decided by the higher court.

And Judge Buffington dissented in the first case.

The Vice-Chancellor in *New Jersey Painting Co.* v. *Local No. 26,* 95 N. J. E. 108; 122 Atl. 622, used vigorous language in coming to the conclusion that an injunction should go against the enforcement of the rule. He said:

> "That the operation of the amendment would be in unlawful restraint of trade is too obvious to require extended discussion. Its effect would be practically to bar a foreign contractor, ruled as he is by the higher union wage scale at his place of business, from successfully competing with a local contractor, for, in bidding, he would necessarily have to estimate on the basis of his home wage scale as against the local contractor's bid at the local and lower scale. This, manifestly, would destroy fair and honest competition. In the instant case it operates to the injury of a citizen of another state, and the union seeks to do, in effect, what the states are forbidden to do by the United States Constitution."

The New Jersey Court of Errors and Appeals in the same case 96 N. J. E. 632; 126 Atl. 399, based its decision upon the statute of New Jersey, P. L. 1883, p. 36; 3 Comp. Stat. of N. J., p. 3051, sec. 128, reading as follows:

> "that it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise or encourage, by peaceable means, any person or persons to enter into any combination

for or against leaving or entering into the employment of any person, persons or corporation."

Five judges of the New Jersey Court of Errors and Appeals dissented, and Judge White, in his dissenting opinion in 126 Atl. at p. 403, said: (not officially reported)

"The place of residence of the contractor is not in any way germane to the wage scale he should be required to pay. If he attempts to do work where there is no established wage scale, his employees or their organization for them, may fix the wages at which they are willing to work and he cannot complain; but where, as here, his employees' organization has fixed the wage scale for the locality involved, they may not, it seems to me, boycott him by providing that because he does not personally live in that locality, but, as here, lives in some other city or state, he shall because of that reason alone be required to pay a higher wage scale. The place of residence of the contractor not being germane to the subject of the wage scale he may be required to pay, any discrimination made against him founded upon such place of residence alone is in principle a boycott, and is unlawful."

"This principle was thought so important by the framers of our Federal Constitution that they provided in that instrument against any such discrimination by any state against the citizens of any other state, and it seems to me a curious condition which, while denying to the sovereign states themselves this privilege of invading the equal rights of the citizens, should accord such right of invasion to the Star Chamber Ex parte Committee which met in Dallas, Texas, in the year 1922, and promulgated the rule here in question for the government (under penalty of strike) of all the citizens of all of the states."

In reaching its conclusion that the statute permitted the enforcement of such a rule as this by strikes, etc., the Court of Errors and Appeals of New Jersey overruled its prior decision in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 218; 79 Atl. 262 and construed the

statute in such a way as to render it offensive to the provisions of the 14th Amendment to the Constitution of the United States.

The case is of so much general importance as to merit a review by this court.

IV.

The decision of the United States District Court was based upon the statute of New Jersey heretofore referred to and its construction by the New Jersey Court of Errors and Appeals in the New Jersey Painting Company case and the effect is that the United States District Court in the instant case has permitted the application of a statute which, as construed by it, is offensive to the provisions of the Fourteenth Amendment.

In *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 219; 79 Atl. 262, in an opinion by the Chancellor, Mahlon Pitney, later a Justice of this Court, the New Jersey Court of Errors and Appeals, said:

> "In Mayer *v.* Journeymen Stonecutters' Asso., 47 N. J. E. (2 Dick) 519, 531, Vice-Chancellor Green apparently treated this act as legalizing private injuries. And in Cumberland Glass Manufacturing Co. *v.* Glass Bottle Blowers' Asso., 59 N. J. E. (14 Dick) 49, 53, Vice-Chancellor Reed construed it as permitting the adoption of peaceable measures for inducing workmen to quit or to refuse to enter an employment. Whatever may have been the purpose of its framer, there are, as we think, constitutional obstacles in the way of giving the act so extensive a force. The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are declared by our Constitution to be unalienable. N. J. Const. art. I, pl. 1. No act of the Legislature is to be construed as infringing upon these rights unless its language plainly and clearly requires such a construction. If

its language so reads, it is to the extent indicated unconstitutional and void. The act of 1883, is as we think, properly to be treated as merely rendering the combination no longer indictable; in effect, as repealing the rule laid down by the Supreme Court of this State in State *v.* Donaldson, 32 N. J. Law (3 Vr.) 151. It does not legitimize an invasion of private rights nor prevent the party injured from having full redress."

Since the decision of the New Jersey Court of Errors and Appeals in *Brennan* v. *United Hatters,* 73 N. J. L. at p. 744, 65 Atl. 165, opinion also written by Justice Pitney and the decision of the same Court in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.,* 77 N. J. E. 219, 79 Atl. 262, also written by Mr. Justice Pitney (then Chancellor), in view particularly of the dissenting opinion of Mr. Justice Minturn which succinctly set forth the effect of the decision as to the statute, it was considered by the Bar that the matter was settled in the State of New Jersey and that, as stated in the Jonas Glass Co. case, the statute could not be given any such wide scope as the New Jersey Court of Errors and Appeals gave it in *New Jersey Painting Co.* v. *Local No. 26,* 96 N. J. E. 632, 126 Atl. 399, and that:

"The act of 1883 is, as we think, properly to be treated as merely rendering the combination no longer indictable; in effect, as repealing the rule laid down by the Supreme Court of this State in State *v.* Donaldson, 32 N. J. L. 151. It does not legitimize an invasion of private rights nor prevent the party injured from having full redress. Its proper scope is indicated in the opinion of Vice-Chancellor Pitney in Frank & Dugan *v.* Herold, 63 N. J. E. 443, 447, 448."

The decision of the Court, upon that point, was dissented to by but one judge, Mr. Justice Minturn. Three other judges dissented from the result but not from that part of the opinion having to do with the scope of this statute.

The opinion in *Jonas Glass Co.* v. *Glass Bottle Blowers Asso.*, 77 N. J. E. 219, relied upon and cited with approval *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881; *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165.

This court has cited with approval the case of *Barr* v. *Essex Trades Council*, 53 N. J. E. 101, 30 Atl. 881, in *Truax* v. *Corrigan*, 257 U. S. 311, 320, 66 L. Ed. 255, and it cited, with approval, *Brennan* v. *United Hatters*, 73 N. J. L. 729, 65 Atl. 165, in *Hitchman* v. *Mitchell*, 245 U. S. 229, 62 L. Ed. 260, and both *Barr* v. *Essex Trades Council* and *Brennan* v. *United Hatters* were cited with approval in *International News Service* v. *Associated Press*, 248 U. S. at page 213, 63 L. Ed. 211.

If the New Jersey statute is to have the construction put upon it by the New Jersey Court of Errors and Appeals in *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. Eq. 632, 126 Atl. 399, and by the District Court in the case at bar, then it is offensive to the 14th amendment under the decision of this court in *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 255. In that case there came before this court the refusal of the Supreme Court of the State of Arizona to grant an employer an injunction against a conspiracy and boycott, one of the concomitants of the conspiracy and boycott being picketing. The Supreme Court of Arizona rested its decision upon a statute of Arizona which, as construed by the Supreme Court of Arizona, prevented the court from prohibiting picketing so long as peaceful, and, as the Chief Justice of this Court said in delivering the opinion of this Court:

> "The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by 'picketing' in any form if violence be not used, and that, because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlawfully invade complainants' rights."

This court held that the statute was unconstitutional both as a taking of property without due process of law and a denial of the equal protection of the law. It said:

> "The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful. • • •"
>
> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence."

This Court held that, if the statute should be construed as merely to withhold from the parties a remedy through the equitable relief of injunction, it was void as denying the equal protection of the law.

This Court said that the classification of employers in the manner created by the statute was illusory, and

> "Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended —its very purpose was—to prevent experimentation with the fundamental rights of the individual. We said through Mr. Justice Brewer, in Muller *v.* Oregon, 208 U. S. 412, 52 L. Ed. 551, 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking." • • •

> "It seems a far cry from classification on the basis of relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employees, on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the State may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?"

The dissenting opinion of Mr. Justice Holmes, in which he says:

> "By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed."

indicates to what extent the prevailing opinion went.

In conclusion I submit to your Honors that if unions are permitted to use the weapon of the strike to enforce a discrimination such as is here involved, merely because that discrimination has to do with the matter of wages, however arbitrary the classification may be, then it will not be difficult to devise means whereby, under the law, the business fabric of the country can be torn apart and the present social system completely destroyed; that if discrimination of this kind is permitted by combinations of labor unions employers must be accorded the same

right as against labor unions, for, as this court said
Coppage v. *Kansas*, 236 U. S. 18, 59 L. Ed. at p. 448:

> "And can there be one rule of liberty for the l
> bor organization and its members, and a differe
> and more restrictive rule for employers?"

Employers, therefore, must be permitted to combine
discriminate against employees upon any conceivab
ground, however arbitrary.

Instead of a government of law, in which each man
free, enjoying equal rights with his fellows, we will ha
a government of labor unions and combinations of e
ployers.

Upon these grounds it is urged that a writ of cer
orari should go as prayed.

Respectfully submitted,

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